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No. 145

In the Supreme Court of the United States

OCTOBER TERM, 1954

CARLOS MARCELLO, PETITIONER

v.

JOHN M. BONDS, OFFICER IN CHARGE, UNITED STATES IMMIGRATION AND NATURALIZATION SERVICE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT

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BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The opinion of the Court of Appeals (R. 32–44) is reported at 212 F. 2d 830. The opinion of the District Court (R. 19–24) is reported at 113 F. Supp. 22.

JURISDICTION

The judgment of the Court of Appeals was entered on May 6, 1954 (R. 45), and a petition for rehearing was denied on May 25, 1954 (R. 51). The petition for a writ of certiorari was filed on June 17, 1954, and granted on October 14, 1954 (R. 86). The jurisdiction of this Court rests on 28 U. S. C. 1254 (1).

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS INVOLVED

The relevant Constitutional provisions, statutes, and regulations are set forth in Appendix A of the petitioner's brief (Pet. Br. 57–64), except that we have set forth in Appendix A of this brief (*infra*, pp. 45–50) certain regulations of the Immigration and Naturalization Service, i. e., 8 C. F. R. 242.53.

QUESTIONS PRESENTED

1. Whether petitioner has shown that his case was prejudged within the meaning of *Accardi* v. *Shaughnessy*, 347 U. S. 260.

2. Whether deportation proceedings must be conducted in accordance with the Administrative Procedure Act.

3. Whether Section 241 (a) (11) and (d) of the Immigration and Nationality Act, in requiring deportation because of conviction of criminal offenses which were not grounds for deportation when they were committed, is invalid as an *ex post facto* law.

STATEMENT

After a hearing before a special inquiry officer of the Immigration and Naturalization Service, an order was entered on February 20, 1953, that the alien petitioner be deported under Section 241 (a) (11) of the Immigration and Nationality Act of 1952 (hereinafter referred to as the Act), in that on October 29, 1938, he had been convicted of violating federal laws relating to traffic in nar-

cotic drugs (R. 67–79). At the hearing, petitioner and his counsel were advised of his right to apply to the Attorney General for the discretionary relief of suspension of deportation under Section 244 (a) (5) of the Act, but they declined to make such application (R. 74, 80–81). On March 4, 1953, the special inquiry officer denied petitioner's motion to reopen the hearing so that he might apply for suspension of deportation, on the ground that petitioner and his counsel had been advised of their right to file such application at the time of the hearing but had refused to do so (R. 79–81).

Upon appeal, the Board of Immigration Appeals, on June 1, 1953, affirmed the order of deportation (R. 54–67). At the instance of petitioner's counsel, the Board itself considered whether suspension of deportation should be granted even though no formal application had been filed. The Board noted that, while consideration of confidential information was permitted, it would under the circumstances "consider only the record, consisting of the hearing and exhibits, in reaching a decision" (R. 64). In deciding that the discretionary relief of suspension of deportation was not warranted, the Board referred to "the record of [petitioner's] conviction in 1938 for two transfers of bulk marihuana, totaling 380 ounces (Ex. 4); a Federal Bureau of Investigation Report (Ex. 5) which shows that he was arrested on several occasions; that most of the charges were dismissed but that in 1930 he was

sentenced to nine to fourteen years for assault and robbery for which offenses he was pardoned on July 25, 1935; clippings from newspapers published in New Orleans, Louisiana (Ex. 7) which the [petitioner's] own counsel submitted and which refer to the [petitioner] as a racketeer, 'number one mobster in Louisiana'; etc.; and his refusal to testify before the Kefauver Committee." (R. 66.)

On June 2, 1953, petitioner filed a petition for a writ of habeas corpus in the District Court for the Eastern District of Louisiana. He alleged, *inter alia*, (1) that 8 U. S. C. 1252 (b) (Section 242 (b) of the Act) violated the due process clause of the Fifth Amendment, in that it did not meet the Amendment's requirements of fairness and impartiality in a hearing, and, also, violated the Administrative Procedure Act (5 U. S. C. 1001 to 1011, particularly Section 1004 (c)); (2) that on the date of petitioner's arrest the Attorney General made a public statement, which was bound to influence the special inquiry officer, to the effect that petitioner was an undesirable citizen for whose deportation the proceedings were designed, and that in 1952 the Attorney General prepared a list of 152 persons, including petitioner, whom he desired to deport; (3) that 8 U. S. C. 1251 (a) (11) and (d) (Sections 241 (a) (11) and (d) of the Act) were unconstitutional as *ex post facto* laws; and (4) that the special inquiry officer had arbitrarily refused to reopen petitioner's hearing to consider

his application for suspension of deportation (R. 2–13). In his return, respondent's predecessor alleged that petitioner's deportation had been conducted in accordance with the Constitution, laws, and regulations of the United States, and that petitioner had been properly found deportable under Section 241 of the Act. There was also filed the official Immigration Service record of petitioner's deportation proceedings (R. 14–16).

After petitioner's counsel introduced in evidence the entire record annexed to the return, he rested his case, and the District Court heard argument for both parties (R. 18). The District Court thereafter filed an opinion holding the deportation order valid (R. 19–24), and entered an order discharging the writ of habeas corpus (R. 25). On appeal (R. 26), the court below unanimously affirmed the judgment (R. 45), and later denied a petition for a rehearing (R. 45–47, 51).

SUMMARY OF ARGUMENT

I

A. Petitioner contends that the fact that he was included in the Attorney General's deportation program and that this was known to the special inquiry officer and to the Board of Immigration Appeals constituted such prejudgment of his case within the rule of *Accardi* v. *Shaughnessy*, 347 U. S. 260, as to invalidate the order for his deportation. The *Accardi* case is again before this Court as *Shaughnessy* v. *Accardi*, No.

616, and we there contend that under the earlier *Accardi* decision an alien must show, not only that he was included in the program and that the Board knew it, but also that the Board was thereby precluded from exercising an independent judgment on his case. If the Court concurs in our view, it follows that petitioner is not entitled to a new hearing before the Board, since he did not even offer to prove that the Board had so prejudged his case.

B. Even if this Court should hold that an alien ordinarily need only show that the Board was aware that he was included in the Attorney General's deportation program, in order to be entitled to a new hearing before the Board, petitioner is not entitled to a new hearing because the record affirmatively shows that the Board exercised an independent judgment in deciding his case.

II

A. The Administrative Procedure Act does not apply to deportation proceedings. Section 242 (b) of the Immigration and Nationality Act prescribes detailed procedures for determining the deportability of aliens, and requires that such proceedings be conducted before special inquiry officers. It further provides that "The procedure so prescribed shall be the sole and exclusive procedure for determining the deportability of an alien under this section." Petitioner contends that even if special inquiry officers may conduct deportation hearings (as special statutory hearing

officers within the meaning of the exception in Section 7 (a) of the Administrative Procedure Act), they are subject to Section 5 (c) of that Act which provides that hearing officers may not be under the supervision of agency officers who perform enforcement functions. However, Section 101 (b) (4) of the Immigration and Nationality Act provides that special inquiry officers "shall be subject to such supervision * * * as the Attorney General shall prescribe," thus making inapplicable the separation of functions requirements of Section 5 (c).

Moreover, the language and legislative history of Section 242 (b) clearly indicate that Congress intended its procedural requirements to govern deportation hearings to the exclusion of the Administrative Procedure Act. Stated otherwise, Congress inserted in Section 242 (b) those principles of the Administrative Procedure Act which it desired to apply to deportation. The inapplicability of the Administrative Procedure Act to deportation proceedings under the 1952 Act is further evidenced by the contemporary understanding of the Department of Justice, critics of the 1952 Act, and the practicing bar.

B. Petitioner's further contention that due process of law requires that deportation proceedings be conducted in accordance with "currently prevailing standards of impartiality" as embodied in the separation of functions requirements of Section 5 (c) is without substance. It is conceded that, prior to the enactment of the

Administrative Procedure Act in 1946, deportation hearings were not invalid because they were conducted by immigation employees who were under the supervision of officers with enforcement functions. Moreover, the requirements of Section 5 (c) are by no means a universal standard, since Congress has exempted from them formal proceedings involving rule-making and applications for licenses, and has provided more or less strict requirements in later amendments to the National Labor Relations Act and the Communications Act, and in the Immigration and Nationality Act. In any event, there is no doubt as to "the constitutional power of Congress to devise differing administrative and legal procedures appropriate for the disposition of issues affecting interests widely varying in kind." *Federal Communications Commission* v. *WJR*, 337 U. S. 265, 276. The fact that in many deportation cases the deportability of the alien is undisputed, leaving only the question of whether some form of discretionary relief should be granted, is ample justification for Congress to prescribe deportation procedures varying from those of the Administrative Procedure Act.

III

Section 241 (a) (11) and (d) of the Immigration and Nationality Act, in providing for deportation because of past convictions for criminal offenses which were not grounds for deportation when they were committed, does not violate the

ex post facto clause of the Constitution. *Harisiades* v. *Shaughnessy*, 342 U. S. 580, 593–595; *Galvan* v. *Press*, 347 U. S. 522, 530–531.

ARGUMENT

I. PETITIONER HAS NOT ESTABLISHED THAT HIS CASE WAS PREJUDGED WITHIN THE MEANING OF *ACCARDI* V. *SHAUGHNESSY*, 347 U. S. 260

A. PETITIONER IS NOT ENTITLED TO A NEW HEARING BECAUSE HE MADE NO OFFER TO PROVE THAT THE BOARD OF IMMIGRATION APPEALS WAS IMPROPERLY INFLUENCED BY THE FACT THAT HE WAS INCLUDED IN THE ATTORNEY GENERAL'S DEPORTATION PROGRAM

In his petition for a writ of habeas corpus (R. 7–8), petitioner alleged that his case had been prejudged in that (1) on the day of his arrest the then Attorney General had issued a public statement concerning petitioner which "was bound to have great effect upon the special inquiry officer"; (2) on information and belief, that the Attorney General sometime in 1952 prepared a list of 152 persons whom he desired to deport, and that petitioner's name was on that list.

Petitioner made no attempt at the hearing on the habeas corpus petition to substantiate these allegations (R. 17). The deportation record which was introduced in evidence does show that, at the deportation hearing before the special inquiry officer, he offered as evidence six newspaper clippings (R. 42, 67), some of which referred to the Attorney General's statement.[1] And in oral

[1] The statement itself was never offered in evidence. We have reproduced it as Appendix C to this brief (*infra*, pp. 53–54). An earlier general statement of the Attorney General is set forth in Appendix B (*infra*, pp. 51–52).

argument before the Board of Immigration Appeals, petitioner's attorney stated (R. 85): "I also have the feeling—and it's a feeling that's based on evidence which we will supply—that the real basis for the denial of suspension here was the fact that Marcello was one of these hundred whom the Attorney General had named. * * *" At no point in the administrative process, however, did he present or offer to present any evidence in support of his charge. The deportation record also shows that the special inquiry officer in his formal opinion in this case, said (R. 72):

> While the instant case does not involve a subversive issue, the inference has been made that the Special Inquiry Officer being responsible to the Attorney General would not be capable of passing a fair and honest judgment in the case. There is no basis for counsel's contention and no restrictions are placed upon the Special Inquiry Officer in his conduct of hearings other than that they be conducted in accordance with the law and the regulations promulgated thereunder. Certainly the Attorney General expects these hearings to be conducted in accordance with the highest standards of fairness and impartiality and that the decision rendered by the Special Inquiry Officer be rendered strictly in accordance with the evidence presented at the hearing.

The Chairman of the Board of Immigration Appeals, in response to counsel's assertion at the oral argument that the Attorney General's public pronouncements must inevitably prejudice his

subordinates against petitioner, pointed out (R. 8) that the person who had made such announcement was no longer the Attorney General. And the Service representative emphasized in his oral argument before the Board (R. 85–86) that it was inconceivable that any Attorney General would contemplate "that a person should be deported if the law provided otherwise."

Thus, it appears that petitioner was included in the Attorney General's deportation program and that the special inquiry officer and the Board of Immigration Appeals were aware of that fact, if only because petitioner told them. To this extent, the case resembles *Shaughnessy* v. *Accardi,* No. 616, now pending before this Court. If the Court should hold, with the majority of the Second Circuit in *Accardi* upon remand, that under this Court's decision in *Accardi* v. *Shaughnessy,* 347 U. S. 260, an alien is entitled to a new hearing before the Board of Immigration Appeals if he shows only that he was included in the program and that the Board knew it, then this petitioner also is entitled to such a new hearing, subject to the matters of record discussed below. On the other hand, if the Court agrees with our contention in *Shaughnessy* v. *Accardi, supra,* that the alien must also allege and prove that the Board was influenced by its knowledge that he was included in the program, then this petitioner is not entitled to a new hearing before the Board. For in the District Court in this case, petitioner, unlike *Accardi,* made no offer of proof that either

the Board or the special inquiry officer had been improperly influenced. Indeed, petitioner did not even allege that the *Board* had been so influenced. Even if his allegation that the Attorney General's statement "was bound to have great effect upon the special inquiry officer" sufficiently alleges prejudgment, it is immaterial since the special inquiry officer did not consider the issue of discretionary relief—the only issue in the case upon which the alleged bias or prejudgment could have any effect.

B. THE RECORD AFFIRMATIVELY SHOWS THAT THE BOARD OF IMMIGRATION APPEALS EXERCISED AN INDEPENDENT JUDGMENT IN THIS CASE

The record clearly shows that the Board of Immigration Appeals exercised an independent judgment. As to petitioner's deportability, the issue was wholly a legal one on undisputed facts. Petitioner's conviction under the Marihuana Tax Act was a matter of record. The Attorney General's press release (Appendix C, *infra*, p. 53) was merely a statement of what was evident from the statute itself, that the 1952 Act made that conviction a ground for deportation. Nothing the Attorney General said or did not say could change the facts of this case with respect to the conviction and the provisions of the statute. The issues of constitutionality which petitioner now raises are obviously matters for a court, and not for the administrative agencies which must take the law as Congress has enacted it.

As to the application for the discretionary relief of suspension of deportation, the allegation of prejudgment is negatived by the fact that, although petitioner had been advised of his right to apply for such relief and had refused to make such application during the hearing before the special inquiry officer, the Board of Immigration Appeals, at the instance of petitioner's counsel, proceeded to consider the application on its merits (R. 64). And, although the Board was aware of its right to consider confidential information, it did not do so but considered the case on the record before it.

The action of the Board in denying suspension of deportation in no way indicates bias. The record (R. 66, 82–84) fully justifies the refusal to grant such extraordinary relief, which is in the nature of a pardon. The factors to be considered in determining whether to grant suspension are obviously very different from those to be considered in determining deportability or guilt of a crime. What the Board was called upon to decide on the suspension issue was whether, on the totality of the evidence before it, petitioner was the type of alien who, despite his statutory liability for deportation, was a sufficiently desirable person to be granted the privilege of continuing to reside in the United States. No one factor may in itself be conclusive in reaching such a determination. Thus, petitioner's marihuana conviction, which occurred more than ten years before the application for suspension, would not necessarily preclude the granting of

relief if the Board were convinced that petitioner had thereafter reformed and become a desirable citizen, but it was a factor which the Board could properly take into account. See *United States ex rel. Adel* v. *Shaughnessy*, 183 F. 2d 371, 373 (C. A. 2). Similarly, the Board was entitled to take into account petitioner's earlier conviction and sentence to nine to fourteen years' imprisonment for assault and robbery for which he was pardoned subsequently. And in determining whether petitioner had in fact reformed and is presently a desirable person, the Board could properly consider the fact that he had asserted the privilege against self-incrimination before the Kefauver committee when questioned as to his gambling activities. *Marcello* v. *United States*, 196 F. 2d 437 (C. A. 5). It is one thing to say that the claim of privilege is not affirmative proof of any kind with relation to guilt, and it is another to say that a claim of the privilege in relation to possible involvement in crime has no possible relevancy in determining whether a person is entitled to a special privilege in the nature of a pardon. Cf. *Orloff* v. *Willoughby*, 345 U. S. 83, 91, where this Court recognized a claim of privilege as to membership in organizations as a valid ground for refusal to grant a commission in the armed forces. It was petitioner's obligation to show that he was a desirable alien. Nothing in the record he presented shows any reason why he should have been given such relief.

It is clear that there has been an exercise of

discretion in this case, both in considering petitioner's application after he had initially refused to apply for such relief, and in determining that petitioner had not made out a case for such relief. There is thus no necessity to send the case back for further hearing.

II. THE ADMINISTRATIVE PROCEDURE ACT DOES NOT APPLY TO DEPORTATION PROCEEDINGS

The petitioner contends that the order for his deportation is void because it was issued after administrative proceedings which admittedly were not conducted in accordance with the Administrative Procedure Act. Specifically, he contends that the deportation hearing was defective in that it was conducted by a special inquiry officer who was under the supervision of officers of the Immigration and Naturalization Service who engage in investigating and prosecuting functions, in violation of Section 5 (c) of the Administrative Procedure Act.[2]

We contend that Section 242 (b) of the Immigration and Nationality Act prescribes a special procedure for deportation cases, to the exclusion of the requirements of the APA. The purpose of Congress not to apply the APA to deportation proceedings is apparent from the language of Section 242 (b), its history and context, and its

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[2] Section 5 (c) provides in pertinent part that "nor shall such [hearing] officer be responsible to or subject to the supervision or direction of any officer, employee, or agent engaged in the performance of investigative or prosecuting functions for any agency."

contemporaneous construction by both the Immigration Service, the practicing bar, and others. The petitioner does not deny that the deportation proceedings in this case complied with the requirements of Section 242 (b).

A. BACKGROUND FOR INTERPRETING THE PROCEDURES OF THE IMMIGRATION AND NATIONALITY ACT OF 1952

1. *Deportation procedure prior to the 1952 Act.* Prior to the enactment of the Immigration and Nationality Act of 1952, the immigration statutes did not specify procedures for determining the deportability of aliens. Thus, Section 19 (a) of the Immigration Act of 1917 (8 U. S. C. [1946 ed.] 155 (a)) simply provided that aliens in the deportable classes "shall, upon warrant of the Attorney General, be taken into custody and deported." However, it was long ago established by the decisions of this Court that due process of law requires that deportation be preceded by an opportunity for a hearing providing the basic elements of fairness. *The Japanese Immigrant Case*, 189 U. S. 86; *Vajtauer* v. *Commissioner*, 273 U. S. 103. Subject to such due process requirements, the detailed procedures in deportation cases were prescribed only in regulations issued by the Attorney General.

When the Administrative Procedure Act became law on June 11, 1946, the Department of Justice was of the view that the Act did not apply to the conduct of deportation proceedings. However, in February 1950, this Court held, in *Wong*

Yang Sung v. *McGrath*, 339 U. S. 23, that deportation proceedings were subject to the Act. In September 1950, Congress provided in the Supplemental Appropriation Act, 1951 (64 Stat. 1044, 1048) that "Proceedings under law relating to the exclusion or expulsion of aliens shall hereafter be without regard to the provisions of sections 5, 7, and 8 of the Administrative Procedure Act."

In brief, except for the few months between the *Sung* decision and the enactment of the Supplemental Appropriation Act, 1951, Congress has not permitted the application of the APA to deportation proceedings, unless it has done so in the Immigration and Nationality Act of 1952.

2. *Special inquiry officers under the 1952 Act.* Sections 236 and 242 (b) of the 1952 Act require that hearings in exclusion and deportation cases be conducted by "special inquiry officers". Section 101 (b) (4) provides that "The term 'special inquiry officer' means any immigration officer who the Attorney General deems specially qualified to conduct specified classes of proceedings, in whole or in part, required by this Act to be conducted by or before a special inquiry officer and who is designated and selected by the Attorney General, individually or by regulation, to conduct such proceedings."

In the great majority of deportation cases, the facts relating to the issue of deportability are largely undisputed, *e. g.* criminal convictions as evidenced by court records, and the real issue is

whether the alien is entitled to some form of discretionary relief such as suspension of deportation. During the Senate debates on the 1952 Act, Senator McCarran noted that "in the majority of deportation cases the issue is simply whether or not the alien entered with proper documents or whether the alien overstayed his period of temporary admission, and that the facts are generally uncontested". 98 Cong. Rec. 5626. It was this characteristic of most deportation cases which led Congress, in Section 242 (b), to provide that the special inquiry officer normally will both preside at the hearing and present the evidence in support of the deportation charges. However, that section expressly authorizes the Attorney General to provide a separate prosecutor in particular cases, as was done in the instant case. The duties of special inquiry officers are further defined in the regulations set out in Appendix A, *infra*, pp. 45–50.

At the present time, there are 75 special inquiry officers assigned to the various districts of the Immigration and Naturalization Service. While most of them are not lawyers, all are experienced in immigration matters. In deportation and exclusion cases, their decisions are final unless appealed to the Board of Immigration Appeals. They are expected to act independently and impartially. Special inquiry officers are subject to the supervision of the District Directors of the districts to which they are assigned and of higher officials of the Service, in such matters as assign-

ments and efficiency ratings. Since District Directors and such officials have enforcement responsibilities, this supervisory relationship would violate Section 5 (c) of the APA if it were applicable.

B. SECTION 242 (B) OF THE IMMIGRATION AND NATIONALITY ACT PROVIDES A SPECIAL PROCEDURE FOR DEPORTATION CASES TO THE EXCLUSION OF THE ADMINISTRATIVE PROCEDURE ACT

1. *The statute.* Section 242 (b) of the Immigration and Nationality Act of 1952 provides that "A special inquiry officer shall conduct proceedings under this section to determine the deportability of any alien, * * *," and that "Determination of deportability in any case shall be made only upon a record made in a proceeding before a special inquiry officer, * * *" (Pet. Br. 58). After prescribing in detail the powers and functions of special inquiry officers and the rights of aliens in deportation proceedings, Section 242 (b) provides that "The procedure so prescribed shall be the sole and exclusive procedure for determining the deportability of an alien under this section" (Pet. Br. 60). As noted above, Section 101 (b) (4) (Pet. Br. 60) also provides expressly that

> The term "special inquiry officer" means any immigration officer who the Attorney General deems specially qualified to conduct specified classes of proceedings, in whole or in part, required by this Act to be conducted by or before a special inquiry officer and who is designated and selected by the Attorney General, individually or

> by regulation, to conduct such proceedings. Such special inquiry officer shall be subject to such supervision and shall perform such duties, not inconsistent with this Act, as the Attorney General shall prescribe.

It is clear that the reiterated command of Section 242 (b), that deportation hearings shall be conducted only by special inquiry officers, brings such officers within the exception of Section 7 (a) of the APA for "officers specially provided for by or designated pursuant to statute". Without more, therefore, it is plain that deportation hearings need not be conducted by hearing examiners appointed under Section 11 of the APA, and petitioner so concedes or assumes (Pet. Br. 25).

However, petitioner insists that special inquiry officers, even if within the quoted exception in Section 7 (a), remain subject to the prohibitions of Section 5 (c)—particularly the provision that hearing officers shall not be under the supervision of officers who perform investigating or prosecuting functions (Pet. Br. 24–26). If the Immigration and Nationality Act did no more than require that deportation hearings be conducted by special inquiry officers, the petitioner's contention might possibly be correct because the exception in Section 7 (a) of the APA for special classes of hearing officers is not an exemption from all of the APA. However, Section 101 (b) (4) of the Immigration and Nationality Act, quoted above, specifically provides that "Such special inquiry

officer shall be subject to such supervision and shall perform such duties, not inconsistent with this Act, as the Attorney General shall prescribe." This specific direction that the Attorney General shall prescribe the supervision to which special inquiry officers shall be subjected is utterly inconsistent with the notion that their relationship to the Attorney General and to the Immigration Service is defined by Section 5 (c) of the APA. The report of the President's Commission on Immigration and Naturalization, *Whom We Shall Welcome* (1953) p. 162, expressly recognizes that the Attorney General under Section 101 (b) (4), rather than Section 5 (c) of the APA, controls the status of special inquiry officers. Thus, Section 101 (b) (4) controls, to the exclusion of the APA, the only specific respect in which petitioner urges that his hearings violated the APA.

Moreover, we contend that Section 242 (b) embodies a clear Congressional purpose to except deportation proceedings from all of the provisions of the Administrative Procedure Act. To begin with, if Congress had desired to subject deportation cases to the APA, it need only have required an opportunity for a hearing in order to invoke automatically the provisions of Sections 5, 7 and 8 of the APA, which apply in cases of adjudication in which a statute requires a hearing. *Wong Yang Sung* v. *McGrath,* 339 U. S. 33. Or, if Congress had simply required an opportunity for a hearing before a special inquiry officer, deportation proceedings would be excepted, under the exception

clause in Section 7 (a), from the necessity for employing hearing examiners appointed under Section 11, but would be subject to the other provisions of the APA.

Instead, in Section 242 (b), Congress enumerated in unusual detail the rights which it desired to accord to aliens in deportation proceedings. In doing so, it specified many of the procedural rights set forth in the APA, rather than leaving such aliens to rely upon the APA as do the parties to other formal regulatory proceedings which are subject to the APA. We set forth below pertinent portions of Section 242 (b), indicating in brackets following the particular requirements the roughly equivalent provisions of the APA:

> A special inquiry officer shall conduct proceedings under this section to determine the deportability of any alien, and shall administer oaths, present and receive evidence, interrogate, examine, and cross-examine the alien or witnesses, and, as authorized by the Attorney General, shall make determinations, including orders of deportation. [APA, Section 7 (b).] Determination of deportability in any case shall be made only upon a record made in a proceeding before a special inquiry officer, at which the alien shall have reasonable opportunity to be present, unless by reason of the alien's mental incompetency it is impracticable for him to be present, in which case the Attorney General shall prescribe necessary and proper safeguards for the rights and privileges of such alien.

If any alien has been given a reasonable opportunity to be present at a proceeding under this section, and without reasonable cause fails or refuses to attend or remain in attendance at such proceeding, the special inquiry officer may proceed to a determination in like manner as if the alien were present. In any case or class of cases in which the Attorney General believes that such procedure would be of aid in making a determination, he may require specifically or by regulation that an additional immigration officer shall be assigned to present the evidence on behalf of the United States and in such case such additional immigration officer shall have authority to present evidence, and to interrogate, examine and cross-examine the alien or other witnesses in the proceedings. Nothing in the preceding sentence shall be construed to diminish the authority conferred upon the special inquiry officer conducting such proceedings. No special inquiry officer shall conduct a proceeding in any case under this section in which he shall have participated in investigative functions or in which he shall have participated (except as provided in this subsection) in prosecuting functions. [APA, Section 11.] Proceedings before a special inquiry officer acting under the provisions of this section shall be in accordance with such regulations, not inconsistent with this Act, as the Attorney General shall prescribe. Such regulations shall include requirements that—

(1) the alien shall be given notice, reasonable under all the circumstances, of the nature of the charges against him and of the time and place at which the proceedings will be held; [APA, Section 5 (a)]

(2) the alien shall have the privilege of being represented (at no expense to the Government) by such counsel, authorized to practice in such proceedings, as he shall choose; [APA, Section 6 (a)]

(3) the alien shall have a reasonable opportunity to examine the evidence against him, to present evidence in his own behalf, and to cross-examine witnesses presented by the Government; and [APA, Section 7 (c)]

(4) no decision of deportability shall be valid unless it is based upon reasonable, substantial, and probative evidence. [APA, Section 7 (c).]

Thus, Section 242 (b) consists of a detailed procedural code which would be largely superfluous if, as petitioner contends, Congress had intended the APA to apply to deportation proceedings. Immediately following these provisions, Section 242 (b) goes on to provide that "The procedure so prescribed shall be the sole and exclusive procedure for determining the deportability of an alien under this section." The natural meaning of these words, reinforced by their context, is that the Congress has clearly and explicitly excepted deportation proceedings from

all of the APA,[3] except to the extent that it has written in Section 242 (b) many of the principles of the APA.

This conclusion has been reached, not only by the court below, but also by every other court which has considered the question. *Farquharson* v. *Landon*, 217 F. 2d 603 (C. A. 9); *Couto* v. *Shaughnessy*, 218 F. 2d 758 (C. A. 2), pending on petition for a writ of certiorari, No. 653; *Suarez-Seja* v. *Landon*, 124 F. Supp. 871 (S. D. Cal.).

2. *The legislative history.* The committee reports and debates incident to the enactment of the 1952 Act amply confirm the express language of Section 242 (b), and reiterate the purpose of Congress to set forth in Section 242 (b) those principles of the APA which it chose to apply to deportation proceedings.

Section 242 (b) had its genesis in a shorter and more general form as Section 242 (b) of S. 3455, 81st Congress, 2d Session, introduced by Senator McCarran in 1950. It appears in somewhat refined form in S. 716 and H. R. 2379, both 82d Cong., 1st Session, introduced by Senator McCarran and Representative Walter in 1951. In these

[3] In view of the express language of Sections 101 (b) (4) and 242 (b), there is not involved any serious question as to the interpretation of the provision of Section 12 of the APA that "No subsequent legislation shall be held to supersede or modify the provisions of this Act except to the extent that such legislation shall do so expressly."

1950 and 1951 bills, Section 242 (b) provided that "Notwithstanding any other law, including the Act of June 11, 1946 (60 Stat. 237) [the APA], the proceedings so prescribed shall be the sole and exclusive procedure for determining the deportability of any alien who is in the United States." All later bills on the subject omitted the phrase "Notwithstanding any other law, including the Act of June 11, 1946 (60 Stat. 237)."

Early in 1952, the Senate and House Committees on the Judiciary respectively reported S. 2550 and H. R. 5678, 82d Congress. In both these bills, Section 242 (b) appeared in substantially its present form and in both it provided, as it now does, that "The procedure so prescribed shall be the sole and exclusive procedure for determining the deportability of an alien under this section."

In the accompanying report of the Senate Judiciary Committee (Sen. Rep. 1137, 82d Cong., 2d Sess., p. 28), presented by Senator McCarran, the following explanation is given:

> *The problem intended to be met by the language of the two predecessor bills in relation to the administrative process is solved by the language of sections 101 (b) (4), 236 and 242 (b) of the instant bill.* Under the provisions of those sections, special procedures are established for the determination of whether or not an alien is subject to exclusion or deportation, under which

> proceedings are to be conducted before special inquiry officers specially qualified to conduct such proceedings and designated by the Attorney General pursuant to the provisions of the bill. *These procedures are made the sole and exclusive ones in such matters. The exemption of deportation proceedings from certain of the provisions of the Administrative Procedure Act* contained in the Supplemental Appropriation Act, 1951 (Public Law 843, 81st Cong.) *is specifically repealed, since the special procedures in the bill make such exemption no longer necessary.* [Emphasis added].

A similar statement appears in the report of the House Committee on the Judiciary.[4]

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[4] The statement is as follows (H. Rep. 1365, 82d Cong., 2d Sess., 55–56, 58):

The exemption of deportation proceedings from certain of the provisions of the Administrative Procedure Act contained in the Supplemental Appropriation Act, 1951 (Public Law 843, 81st Cong.), is specifically repealed by section 403 (a) (46) of the instant bill. Under sections 101 (b) (4), 236, and 242 (b) special procedures are established for the determination of whether or not an alien is subject to exclusion or deportation, which proceedings are to be conducted before special inquiry officers specially qualified to conduct such proceedings and designated by the Attorney General pursuant to the provisions of the bill. These procedures are made the sole and exclusive ones in such matters.

* * * * *

The bill declares that the prescribed deportation proceedings shall be the sole and exclusive procedure for determining the deportability of any alien, notwithstanding the provisions of any other law.

It should be noted that the minority of the Senate Judiciary Committee had no doubt as to the intended purpose of Sections 101 (b) (4) and 242 (b), for they charged, in their separate report (Part 2 of Sen. Rep. 1137, p. 7), that—

> S. 2550 invalidates or emasculates the application of the Administrative Procedure Act to immigration and deportation cases at many points. In effect it would make permanent law of an appropriation rider overruling the decision of the United States Supreme Court in *Wong Yang Sung* v. *McGrath* (339 U. S. 33), and would endorse the practice of prosecutors serving as judges in immigration cases.

During the debate in the Senate, Senator Douglas attacked the bill for its failure to make the APA wholly applicable to deportation and exclusion proceedings, and urged the adoption of a substitute amendment (S. 2842, 82d Cong., 2d Sess.) which would have done so specifically. Thereupon, Senator McCarran, in reply, made the most detailed explanation of the procedural provisions of the bill which occurred in the entire Congressional debate, as follows (98 Cong. Rec. 5625–5626):

> The committee bill, likewise, repeals the present exemption of exclusion and expulsion proceedings from certain of the pro-

visions of the Administrative Procedure Act, but the committee bill goes further by writing within the framework of the Administrative Procedure Act *specific procedures which are specially adapted to the exclusion and expulsion of aliens.*

* * * * *

Under the provisions of section 242 of Senate bill 2550, this exemption [referring to the appropriation rider] is terminated. *The procedural requirements to be followed in the conduct of deportation cases are set out in detail.* Except for the failure to comply strictly with the dual-examiner provisions of the Administrative Procedure Act, I believe that the procedures set forth are in substantial compliance with the procedural rationale of the Administrative Procedure Act. I further believe that it has been demonstrated that it would be impracticable to adapt the dual-examiner system to the deportation procedures and that the special procedures provided in this bill are not inconsistent with section 7 of the Administrative Procedure Act which specifically exempts from the dual-examiner requirements specified classes of proceedings before officers specially provided for by, or designated pursuant to, statute.

Let me stress this point, Mr. President: *My consistent effort has always been to avoid or eliminate any and all blanket exemptions from the Administrative Procedure Act. This bill eliminates such an exemption in the case of deportation proceedings, but accomplishes such elimination*

> *with due regard for the administrative problems of the Immigration and Naturalization Service by providing at the same time the special procedures which these problems require. An important point here is that the Congress is providing these procedures. Under a blanket exemption, the agency would prescribe its own procedures.* [Emphasis added.]

The Conference Report (H. Rep. 2096, 82d Cong., 2d Sess., p. 127) significantly remarks that "the procedures provided in the bill * * * remain within the framework and the pattern of the Administrative Procedure Act."

Thus, the development of Section 242 (b) was from general procedural requirements, coupled with a complete exemption from the APA, which would have left the Attorney General with large discretion to prescribe deportation procedures, to a detailed and exclusive procedural code, partly drawn from the APA and shaped to the peculiar problems of deportation. The clear purpose of the draftsmen was to exclude the application of the APA as such.

Petitioner has culled from the unusually bitter debates over the bill various general statements of Representative Walter and Senator McCarran to the effect that the entire APA was applicable to deportation proceedings (Pet. Br. pp. 19–20). When these statements are evaluated in the light of the committee reports submitted by Representative Walter and Senator McCarran (*supra*, pp. 26–28), and particularly when Senator McCarran's

statements are read with his detailed reply to Senator Douglas (*supra*, pp. 28–30), it is clear that they meant that special procedures had been tailored for the conduct of deportation (and exclusion) procedures, and that these special procedures specifically embodied such of the principles of the APA as they thought could be applied usefully. Indeed, as petitioner recognizes, Senator McCarran's express statement that the "dual examiner provisions" of the APA were inapplicable (*supra*, p. 29), by which he meant that under Section 242 (b) a special inquiry officer could act as both prosecutor and hearing officer (Pet. Br. 22), undermines any suggestion that deportation proceedings are subject to the provisions of the APA except as they are embodied in Section 242 (b).

3. *The contemporary construction of the 1952 Act.* It is a significant guide to the interpretation of Sections 101 (b) (4) and 242 (b) that the Department of Justice, which was charged with the administration of the Act and which was in close contact with its legislative evolution, has from the beginning interpreted those sections as controlling deportation proceedings to the complete exclusion of the APA.[5] It should be noted

[5] While petitioner suggests (Pet. Br. pp. 28–29) that the Immigration Service, by providing in some cases for the participation of an examining officer or prosecutor in addition to the special inquiry officer, has itself recognized that Section 242 (b) does not provide an exclusive procedure, the suggestion is erroneous in that it overlooks the fact that Section 242 (b) expressly authorizes such use of a separate prosecutor.

that the Congress, whose concern with administration of the immigration laws culminated with the creation in Section 401 (of the 1952 Act) of a Joint Committee on Immigration and Nationality Policy, has given no indication that it disagrees with this administrative construction.

Equally significant is the fact that the severest critics of the 1952 Act have recognized that Section 101 (b) (4) and Section 242 (b) make the APA inapplicable. Thus, in *Whom We Shall Welcome* (1953) pp. 159–160, the report of the President's Commission on Immigration and Naturalization, prepared after enactment of the 1952 Act, it is stated that these sections "forge a pattern which reveals an unmistakable purpose to exempt immigration hearings from the procedural requirements of the Administrative Procedure Act," and that "The apparent purpose of these provisions was to establish an exemption from the procedural requirements of the Administrative Procedure Act without specifically mentioning that statute." Moreover, the Commission specifically recognized that Section 101 (b) (4), providing that special inquiry officers "shall be subject to such supervision * * * as the Attorney General shall prescribe", authorized placing them under the supervision of officers with enforcement functions. *Ibid.* p. 162.

Indeed, petitioner's present counsel, Mr. Wasserman, testified before the Commission shortly after enactment of the 1952 Act, as the representative of the Association of Immigration and Na-

tionality Lawyers. On that occasion, he made the following statement:

> Section 242–b of Public Law 414 does not provide for the type of independent hearing examiners which fairness and the due-process clause of the Constitution, and *Sung* v. *McGrath* (339 U. S. 33), require in deportation cases. Provision is merely made for a special inquiry officer who may be an investigator or prosecutor for the Im[mi]gration Service one day and a hearing officer the next, provided that he has not investigated the case he is hearing. In the very case that he hears, the special inquiry officer will be required to develop the case against the alien and then sit in judgment. *In addition, contrary to the Administrative Procedure Act (5 U. S. C. 1004, 1010) the special inquiry officer will be subject to control of district directors and Assistant Commissioners of the Immigration Service who engage in investigative and prosecuting functions.* * * * [Emphasis added.] [*Hearings before the President's Commission on Immigration and Naturalization* (1952), pp. 1597–1598.]

Thus, responsible criticism of the 1952 Act, contemporaneous with its enactment, recognized that Sections 101 (b) (4) and 242 (b) made the APA entirely inapplicable to deportation proceedings.

4. *Practical consequences.* If it should be held that the APA is more or less applicable to deportation proceedings conducted under Section 242 (b), the result will be to invalidate all outstanding deportation orders issued under the 1952

Act after proceedings in which appropriate and timely objection was made. Cf. *United States* v. *Tucker Truck Lines*, 344 U. S. 33.

Equally important, the rationale of the petitioner's argument may be as applicable to exclusion proceedings under Section 236, which provides that its detailed procedures required to be conducted by a special inquiry officer, "shall be the sole and exclusive procedure for determining admissibility of a person to the United States under the provisions of this section." The fact that there is not the slightest suggestion that Congress in 1952 intended to subject exclusion procedures to the APA compels the rejection of any construction of the 1952 Act which would make the APA applicable to both deportation and exclusion proceedings.

5. *Summary.* The language, legislative history, and contemporary construction and understanding of Sections 101 (b) (4) and 242 (b) indicate a clear and specific purpose of Congress to except deportation (and exclusion) proceedings from all of the APA as such. In these sections, Congress has shaped special and exclusive procedures for determining deportability and which embody those principles of the APA which Congress desired to apply in such cases.

C. DUE PROCESS OF LAW DOES NOT REQUIRE THE APPLICATION TO DEPORTATION PROCEEDINGS OF THE SEPARATION OF FUNCTIONS REQUIREMENTS OF SECTION 5 (C) OF THE ADMINISTRATIVE PROCEDURE ACT

Petitioner also contends (Pet. Br. 29–40) that, even if the APA does not apply to deportation

proceedings, due process of law requires that such proceedings be conducted in accordance with the separation of functions requirements of Section 5 (c) of the APA. Specifically, he contends that there is a denial of due process in that, as specifically authorized by Section 242 (b), the special inquiry officer usually both conducts the hearing and introduces evidence in support of the deportation charge, and may have performed other prosecuting or investigatory functions in other deportation cases. We concede that such combinations of functions are prohibited by Section 5 (c). Petitioner alleges a further violation of due process in that the special inquiry officer in this and similar cases is under the supervision of officials of the Immigration Service with enforcement functions to an extent which would violate Section 5 (c) of the APA.[8] Relying primarily upon language from this Courts' opinion in *Wong Yang Sung* v. *McGrath*, 339 U. S. 33, 50–51, petitioner asserts that due process of law requires that deportation proceedings be conducted in accordance with "currently prevailing standards of impartiality" which, he contends, consist particularly of the separation of functions requirements of Section 5 (c).

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[8] In petitioner's deportation hearing, a separate prosecutor appeared and the special inquiry officer acted only in a presiding and deciding role. Thus, petitioner has standing to complain only that the special inquiry officer may have performed investigatory or prosecuting functions in other cases, and is under the supervision of officials with enforcement functions.

Petitioner does not deny that, prior to the APA and the *Sung* decision, it was settled that the combination of functions of prosecution and decision in a single hearing officer, who was under the supervision of enforcement officials, did not offend due process. *In re Giacobbi*, 32 F. Supp. 508 (N. D. N. Y.), affirmed *sub nom. United States ex rel. Giacobbi* v. *Fluckey*, 111 F. 2d 297 (C. A. 2); *United States ex rel. Boric* v. *Marshall*, 4 F. Supp. 965 (W. D. Pa.), appeal dismissed, 67 F. 2d 1020 (C. A. 3), certiorari dismissed, 290 U. S. 709; *Palmer* v. *Ultimo*, 69 F. 2d 1 (C. A. 7), certiorari denied, 293 U. S. 570; *Reynolds* v. *United States ex rel. Dean*, 68 F. 2d 346 (C. A. 7), certiorari denied, 291 U. S. 679; *United States ex rel. Catalano* v. *Shaughnessy*, 197 F. 2d 65 (C. A. 2).

In *Sung* v. *McGrath, supra*, this Court held as a matter of statutory construction that the APA governed deportation proceedings. In so holding, the Court's opinion contains a passage (339 U. S. at 50–51) relied upon by petitioner (Pet. Br. 30–31), particularly the statement that "When the Constitution requires a hearing, it requires a fair one, one before a tribunal which meets at least currently prevailing standards of impartiality." From this passage, including the quoted statement, petitioner deduces that only a hearing conducted in accordance with Section 5 (c) of the APA can satisfy the requirements of due process.

We respectfully submit that this passage of the Court's opinion does not bear the reading petitioner puts upon it, and, at most, is dictum, as

shown by the fact that in the same opinion the Court noted that "The agencies, unlike the aliens, have ready and persuasive access to the legislative ear and if error is made by including them, relief from Congress is a simple matter" (339 U. S. at 47). "It would be an impertinence to suppose that this suggestion of the Supreme Court was made without regard to the effect of such Congressional action upon the constitutional requirements of due process." *United States ex rel. DiDente* v. *Ault*, 101 F. Supp. 496, 499 (N. D. Ohio). Moreover, the later decisions of this Court in *Harisiades* v. *Shaughnessy*, 342 U. S. 580, 583, fn. 4, and *United States* v. *Tucker Truck Lines, Inc.*, 344 U. S. 33, are to the effect that the hearing examiner requirements of the APA are not an essential element of procedural due process, but may be withheld in certain areas by the Congress or waived by the parties. Indeed, Mr. Justice Frankfurter, dissenting in *Tucker*, apparently took for granted the power of Congress, following the *Sung* decision, to exempt deportation proceedings from the APA. 344 U. S. at 40.

Following the enactment of the provision of the Supplemental Appropriation Act, 1951 (*supra*, p. 17), which abrogated the *Sung* decision, and while that provision was in effect,[7] petitioner's present argument that due process of law requires compliance with the detailed provisions of the APA was repeatedly urged and uniformly re-

[7] It was repealed by Section 403 (a) (47) of the 1952 Act.

jected by the courts. *Belizaro* v. *Zimmerman,* 200 F. 2d 282 (C. A. 3); *Barber* v. *Yamish,* 196 F. 2d 53, 54, fn. 1 (C. A. 9), certiorari denied, 344 U. S. 817; *McGrath* v. *Potash,* 199 F. 2d 166 (C. A. D. C.); *United States ex rel. Lombardo* v. *Bramblett,* 114 F. Supp. 183 (N. D. Ohio), affirmed, 212 F. 2d 791 (C. A. 6), *Sigurdson* v. *Landon,* 215 F. 2d 791 (C. A. 9), certiorari denied, 348 U. S. 916; *United States ex rel. DiDente* v. *Ault,* 101 F. Supp. 496 (N. D. Ohio); see *United States ex rel. Dolenz* v. *Shaughnessy,* 200 F. 2d 288, 290 (C. A. 2), certiorari denied, 345 U. S. 928.

Turning to Section 5 (c) of the APA, we find that its separation of functions requirements are not applicable to many Federal regulatory proceedings. Thus, Section 2 (a) of the APA exempts selective service functions from all of the procedural provisions of the Act. See *United States* v. *Nugent,* 346 U. S. 1. More important, Section 5 (c) does not apply to rule-making proceedings (as defined in Section 2 (c)) or in determining applications for initial licenses—exceptions which include a large part of the formal proceedings of such agencies as the Civil Aeronautics Board, Interstate Commerce Commission, Federal Power Commission, and Federal Communications Commission.

Moreover, in the 1947 amendments to the National Labor Relations Act and in the 1952 amendments to the Communications Act, Congress has prescribed for the National Labor

Relations Board and the Federal Communications Commission stronger separation of functions requirements than are contained in Section 5 (c). Almost simultaneously, in Section 242 (b) of the Immigration and Nationality Act, Congress expressly prescribed for deportation proceedings requirements less strict than those of Section 5 (c). Thus, Section 5 (c) does not constitute *the* "currently prevailing standards of impartiality," but is only one of several standards which Congress has used since enactment of the APA in 1946. As this Court noted in *United States* v. *Morton Salt Co.*, 338 U. S. 632, 644, the APA "created safeguards even narrower than the constitutional ones."

The power of Congress to shape administrative procedures to fit particular situations is beyond question. In *Federal Communications Commission* v. *WJR*, 337 U. S. 265, 275–276, this Court reiterated that "due process of law has never been a term of fixed and invariable content," and pointed out that the Constitution "has left wide discretion to Congress in creating the procedures to be followed in both administrative and judicial proceedings, * * *". In the same opinion, the Court recognized "the constitutional power of Congress to devise differing administrative and legal procedures appropriate for the disposition of issues affecting interests widely varying in kind." Indeed, where Congress has been less explicit than it has been here in prescribing administrative procedures, this Court has not hesitated

to construe a statutory requirement of a "hearing" in the light of the practical and policy demands of a particular regulatory problem. *Norwegian Nitrogen Products Co.* v. *United States,* 288 U. S. 294; *United States* v. *Nugent,* 346 U. S. 1.

Thus, it is clear that Section 5 (c) of the APA does not constitute an exclusive prevailing standard of "impartiality," and that Congress, rather than being obliged to create and adhere to such a standard, has broad power to prescribe different procedures for varied administrative tasks. No more is necessary to sustain the validity, under the due process clause, of the deliberate departure in Sections 101 (b) (4) and 242 (b) of the 1952 Act from the standards of Section 5 (c) of the APA.

However, it should be pointed out that considerations peculiar to deportation proceedings provide a rational justification for the Congressional choice of procedure. As noted above, the sole or principal issue in most deportation cases is whether the alien shall be granted some form of discretionary relief. Since such relief as the suspension of deportation sought by the alien in this case (and in *Shaughnessy* v. *Accardi*) is a matter of legislative grace, akin to a pardon, the Constitution probably does not require that an alien be accorded any kind of hearing on his application for such relief. Moreover, the determination of such discretionary matters involves considerations of policy for which the Congress

presumably desires to hold the Attorney General fully responsible. Thus, it is unlikely that Congress would be willing to accord to special inquiry officers or any other hearing officers a larger and more independent role (cf. *Universal Camera Corp.* v. *N. L. R. B.*, 340 U. S. 474, 496) in determining applications for discretionary relief, particularly since it has reserved to itself a veto power over the administrative grant of suspension of deportation under Section 244 of the 1952 Act.

In short, there is no basis for petitioner's contention that Congress is without power under the Constitution to except deportation proceedings from the requirements of Section 5 (c) of the APA.

III. SECTION 241 (a) (11) AND (d) OF THE IMMIGRATION AND NATIONALITY ACT DOES NOT VIOLATE THE *EX POST FACTO* CLAUSE OF THE CONSTITUTION

Petitioner contends that his deportation pursuant to Section 241 (a) (11) and (d) of the 1952 Act constitutes a retroactive imposition of punishment in violation of the *ex post facto* clause of Article I, Section 9, of the Constitution (Pet. Br. 40–56). We contend, to the contrary, that, as repeatedly and recently decided by this Court, the prohibition of the *ex post facto* clause does not apply to deportation.[8]

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[8] While petitioner suggests in his brief (Pet. Br., pp. 41–42) that it is doubtful whether Section 241, when read in the light of the savings clause of Section 405 (a) (Pet. Br. 61–62), can be applied retroactively to effect his deportation,

The deportation order against petitioner is based entirely on the admitted fact (R. 4) that in 1938 he was convicted and sentenced for unlawfully transferring marihuana, in violation of the Marihuana Tax Act of August 2, 1937, 26 U. S. C. [1952 ed.] 2591. At that time, such conviction and sentence did not render petitioner deportable. The crime was not regarded as one involving moral turpitude within the meaning of Section 19 of the Immigration Act of 1917, 8 U. S. C. [1946 ed.] 155, *United States ex rel. Andreacchi* v. *Curran*, 38 F. 2d 498 (S. D. N. Y.);[8] and the Act of February 18, 1931, 8 U. S. C. [1946 ed.] 156a, which prescribed deportation for aliens convicted of trafficking in certain specified narcotics, did not then include marihuana among the drugs enumerated. Marihuana was added to the list by Section 21 of the Alien Registration Act of 1940, 54 Stat. 673, but Section 22 of that Act gave the addition only prospective application. Consequently, until the 1952 Act went into effect, petitioner was not deportable by reason of his 1938 narcotics conviction.

Section 241 (a) (11) of the 1952 Act (Pet. Br. 57) requires the deportation of any alien "who at any time has been convicted of a violation of

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this contention is not properly before the Court, since it was presented only in his supplemental petition for certiorari which was denied. 348 U. S. 805. In any event, even if the saving clause of Section 405 (a) would otherwise be applicable, Section 241 (d) clearly carves out an exception to it. See Brief for the Respondent, *Pino* v. *Landon*, No. 333, this Term, pp. 42–47.

[8] A contrary view has recently been expressed in *United States ex rel. DeLuca* v. *O'Rourke*, 213 F. 2d 759 (C. A. 8).

any law or regulation relating to the illicit traffic in narcotic drugs, or who has been convicted of a violation of any law or regulation governing or controlling the taxing * * * of * * * marihuana." Section 241 (d) (Pet. Br. 58) makes it clear that the quoted portion of Section 241 (a) (11) is applicable not only prospectively but also to aliens like petitioner whose convictions occurred prior to the enactment of the 1952 Act. See Brief for the Respondent, *Pino* v. *Landon*, No. 333, this Term, pp. 42–47.

Petitioner's entire *ex post facto* argument has been rejected by this Court in *Harisiades* v. *Shaughnessy*, 342 U. S. 580, 593–595, and *Galvan* v. *Press*, 347 U. S. 522, 530–531, reiterating earlier decisions that the deportation process is a civil proceeding, that deportation is not a punishment, and that the *ex post facto* clause has no application to deportation. *Bugajewitz* v. *Adams*, 228 U. S. 585; *Mahler* v. *Eby*, 264 U. S. 32.

We would only add that petitioner's complaint that, when he was convicted in 1938 of transferring 380 ounces of marihuana, he was not forewarned that such transactions might characterize him as an undesirable alien for the purpose of deportation (Pet. Br. 42) is singularly unappealing.

CONCLUSION

It is therefore respectfully submitted that the judgment below should be affirmed.

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APPENDIX A

8 C. F. R. 242.53 provides as follows:

§ 242.53. *Conduct of hearing*—(a) *Special inquiry officer; general powers.* The special inquiry officer assigned to conduct the hearing under this part shall have authority to:

(1) Administer oaths and affirmations;

(2) Issue, during the course of a hearing, any subpenas authorized by law;

(3) Conduct the hearing, present and receive evidence, and rule upon all objections to the introduction of evidence or motions made during the course of the hearing;

(4) Take or cause depositions to be taken;

(5) Make decisions in accordance with § 242.61 or § 242.76; and

(6) Take any further action consistent with applicable provisions of law and regulation.

(b) *Special inquiry officers; general duties.* The special inquiry officer shall conduct a fair and impartial hearing. No decision of deportability shall be valid unless based upon reasonable, substantial and probative evidence. He shall exclude from the record any evidence that is irrelevant, immaterial, or unduly repetitious. In his discretion, he may exclude from the record any argument in support of objections, but in such event, the respondent may submit a brief in support of such objections. If the testimony is transcribed, the special inquiry officer shall certify that to the best of his knowledge and belief the transcript is a true and correct report of everything that was stated during the course of

the hearing, including oaths administered and rulings on objections, but excluding statements made off the record.

(c) *Special inquiry officers; specific duties.* At the commencement of the hearing under this part, the special inquiry officer shall (1) place the respondent under oath or affirmation, (2) advise the respondent of his right to representation, at no expense to the Government, by counsel authorized to practice in such proceedings, as he shall choose, and require him to state then and there for the record whether he desires such representation, (3) enter of record a copy of the warrant of arrest and a copy of Form I–226 when such form contains charges in addition to those contained in the warrant of arrest, and explain to the respondent in simple, understandable language the nature of the charges contained in the warrant of arrest and the additional charges contained in Form I–226, (4) advise the respondent that he will have a reasonable opportunity to examine the evidence against him, to present evidence in his own behalf, and to cross-examine witnesses presented by the Government, and (5) present the evidence, including the interrogation, examination, and cross-examination of the respondent and witnesses to the extent necessary, as to (i) alienage, (ii) date, place and manner of entry of the respondent into the United States, (iii) grounds for deportation, (iv) factors bearing upon the respondent's eligibility for discretionary relief if application therefor has been made, and (v) such other matter as may be pertinent to the issues in the case. Except in the case of an alien prima facie deportable under section 242 (f) of the Immigration and Nationality Act, the special inquiry officer, in such cases

and at such time during the hearing as he deems appropriate, may advise the respondent concerning application for the privilege of suspension of deportation or voluntary departure under the provisions of section 244 of the said Act, and shall further advise the respondent of his right to specify the country to which his deportation is to be directed in the event such deportation is required by law and request the respondent to specify such country for the record.

(d) *Special inquiry officers; additional charges.* If it appears during the hearing that the responent may be deportable on charges other than or in addition to those contained in the warrant of arrest or in the notice of hearing, the special inquiry officer, except as provided in § 242.75, may lodge additional charges against the respondent and shall develop evidence upon such charges in like manner as on the charges contained in the warrant of arrest or notice of hearing. When additional charges are lodged, the special inquiry officer shall explain these charges to the respondent in simple, understandable language and shall advise him, if he is not represented by an attorney or other qualified representative, that he may be so represented if he desires, and require him to state then and there for the record whether he desires such representation. The special inquiry officer shall also inform the respondent that he may have a reasonable period of time within which to meet the additional charges, if he desires, and require him to state then and there whether he desires such additional time.

(e) *Withdrawal and substitution of special inquiry officer.* The special inquiry officer assigned to conduct the hearing may at any time withdraw

if he deems himself disqualified. If a special inquiry officer becomes unavailable to complete his duties within a reasonable time, another special inquiry officer shall be assigned to complete the case. In such event, the new special inquiry officer shall familiarize himself with the record in the case and shall state for the record that he has done so.

(f) *Assignment of examining officer in addition to special inquiry officer; duties of examining officer.* Prior to the commencement of a hearing, or during the course of a hearing upon the request of the special inquiry officer presiding at such hearing, the district director or the officer in charge having administrative jurisdiction over the place where the proceedings are pending, in his discretion, may assign an immigration officer to act at the hearing as the examining officer. The examining officer shall in such case conduct any required interrogation of the respondent and of the witnesses in behalf of the Government, examine or cross-examine the respondent's witnesses and present evidence bearing upon the question whether the respondent is subject to deportation. Except as provided in §§ 242.74 and 242.75, he shall lodge such additional charges as he may find to be applicable and, if the respondent has applied for relief from deportation, inquire thoroughly into the respondent's eligibility for the relief requested, and develop such other information as may be pertinent to the proper disposition of the case. The assignment of an examining officer shall not impair the authority conferred by the Immigration and Nationality Act or this chapter upon the special inquiry officer presiding at such hearing.

(g) *Representation by counsel.* If the respondent is represented at the hearing by an attorney or other qualified representative, the attorney or representative shall be permitted to be present during the entire hearing, to introduce evidence in behalf of the respondent and to cross-examine witnesses. The attorney or representative shall be permitted to state his objections succinctly, and they shall be entered on the record. If representation is waived, the respondent shall be permitted to introduce evidence in his own behalf, to cross-examine witnesses, and to make objections which shall be entered on the record.

(h) *Interpreters.* If the services of an interpreter are found necessary in the conduct of a hearing, the special inquiry officer, if qualified, may act as interpreter with the consent of the respondent, or he may request the district director or the officer in charge having administrative jurisdiction of the office in which the proceedings are pending to furnish an interpreter, who shall be sworn to interpret and translate accurately, unless the interpreter is an employee of the Service, in which event, no such oath shall be required.

(i) *Postponement and adjournment of hearings.* Prior to the commencement of a hearing, the district director or the officer in charge having administrative jurisdiction of the office wherein the case is pending, may grant a reasonable postponement for good cause shown, at his own instance upon notice to the respondent, or upon request of the respondent. After the commencement of the hearing, the special inquiry officer presiding at the hearing may grant a reasonable adjournment for good cause shown, at his own instance upon notice to the respondent or

upon request of the respondent. A continuance of the hearing for the purpose of allowing the alien to obtain representation, shall not be granted more than once, unless sufficient cause for the granting of more time is shown. The file or the record of hearing shall reflect the action taken with respect to any postponement or adjournment of hearing. Exceptions to a ruling on a request for a postponement or an adjournment of hearing may be taken by the respondent and, if taken, shall be noted on the record.

(j) *Consolidation.* Whenever two or more cases pending in the same district involve common questions of law or fact, the district director or the officer in charge having administrative jurisdiction of the office wherein the cases are pending, may order a joint hearing of any or all matters and issues common to the cases, he may order all such hearings consolidated, and may make such further orders as may tend to avoid unnecessary cost and delay.

APPENDIX B

[For release on delivery, October 2, 1952]

DEPARTMENT OF JUSTICE

Attorney General James P. McGranery today made the following statement:

I am happy to see you again and to have the opportunity to discuss with you the program of the Department.

My main purpose in inviting you today is to explain to you a program which has been formulated to answer a departmental need which I have recognized for some years. You already have glimpsed part of our purpose—but our ultimate goal has never been clearly stated.

Our final goal—which we approach with vigorous determination is to restore the dignity of citizenship and to realize the promise of a full life in accordance with American ideals for those who come to us from foreign lands.

In order to achieve this positive end it is necessary to thwart the criminal activities as pursued by those ungrateful recipients of American hospitality—the naturalized racketeers—who insult the Flag and the Nation by flagrant disrespect and disobedience to the laws of the land which has given them refuge and freedom. Hence there will be a series of individual petitions to the District Courts to revoke naturalization. We will pursue a similar course with respect to Communists who have reached their status as citizens through naturalization.

In addition, appropriate action for deportation will be taken against the unsavory characters who have continued to be aliens technically as well as in the broader sense. We will do our job with thoroughness so that we can be certain that every bit of evidence necessary to successful prosecution will be properly presented.

I may digress here to say that—it is and has been my earnest and considered opinion—the execution of this plan will do much to destroy the roots of organized crime in America.

There will, of course, be no relaxation in our continuing program of deporting Communist aliens.

We already have told you that we are moving for the denaturalization of Frank Costello. You also have been told of our order that Charles Chaplin be held for hearing when he seeks to reenter this country. He will be required to show, as does every alien seeking original entry, that he is admissible under our immigration laws.

This should be a salutary lesson for the youth of our land who are striving to determine for themselves what it means to be a citizen. It will give a new meaning to citizenship in that those who seek it, owe it to the nation to live good lives and contribute to its welfare.

APPENDIX C

[For immediate release Tuesday, December 30, 1952]

Department of Justice

Attorney General James P. McGranery announced today that Carlos Marcello of Miami, Florida, and Jefferson Parish, Louisiana, has been arrested on a deportation warrant by the Immigration and Naturalization Service.

The arrest in New Orleans was the first major deportation move undertaken since the new Immigration and Nationality Act became effective December 24, 1952. The action was another step in the Attorney General's program of denaturalization and/or deportation of undesirable persons of foreign birth who are engaged in racketeering or other criminal activities.

Marcello, born February 6, 1910, in Tunis, Africa, entered the United States for permanent residence October 7, 1910, at New Orleans.

He allegedly is engaged in large scale slot machine operations and other gambling activities in Louisiana.

The deportation warrant was based on his conviction in 1938 for violation of the Marijuana Act. Such a conviction is a deportable offense under the new Immigration and Nationality Act.

The action follows lengthy investigations by both the Federal Bureau of Investigation and the Immigration and Naturalization Service. His conviction under the Marijuana Act was one of only two in his checkered career. The other

case in which he was convicted was under Louisiana State law, the conviction being for assault and robbery, and on May 13, 1930, he was sentenced to serve a term of 9 to 14 years in the Louisiana State Penitentiary. The Governor of Louisiana gave him a full pardon for this crime July 16, 1935.

Marcello served a year and a day after his conviction under the Marijuana Act.